Docket No. 122873

IN THE ILLINOIS SUPREME COURT

MARTIN CASSIDY,

Plaintiff-Appellee,

v.

CHINA VITAMINS, LLC,

Defendant-Appellant,

and

TAIHUA GROUP SHANGHI TAIWEI TRADING COMPANY LIMITED and ZHEJIANG NHU COMPANY, LTD.,

Defendants.

On Appeal from the Illinois Appellate Court, First Judicial District, Docket No. 1-16-0933, there heard on appeal from the Circuit Court of Cook County, Law Division Court No. 07 L 13276, the Honorable Kathy M. Flanagan, Judge Presiding

BRIEF *AMICUS CURIAE* FOR THE ILLINOIS TRIAL LAWYERS ASSOCIATION

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POINTS AND AUTHORITIES

INTRODUCTION

As we explain below, this case is about strict-tort product liability, and in particular, how that liability is related to the role which importers, distributors[1] and sellers have with respect to product safety in our state.

Since its adoption in 1965, product liability in strict tort has always been about the public policy of protecting consumers from unreasonably dangerous products. In our brief, we analyze how the Distributor Statute [2] should be construed in order to carry out the intent of the legislature in enacting that statute. Our analysis includes an examination of the relevant public policy of this state as it applies to consumer protection; one appropriate method of construing the plain text of the statute; and an alternative method of doing so, which assumes an ambiguity in the statute. Finally, we analyze the relevant public policy of consumer protection as it has evolved since distributor liability was adopted in the *Suvada* case and as it was modified by the Distributor Statute.

As we set forth below, our analysis of the relevant public policy includes in particular the current public policy implications of rewarding product manufacturers whose governments are willing to hide and protect their native manufacturers from responsibility for defective and unreasonably dangerous products. This latter point, perhaps the most compelling in this brief, is not a matter of forensic hyperbole. The U.S.-China Economic and Security Review Commission was created by the United States Congress in October 2000 with the legislative mandate to monitor, investigate, and

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[1] In this brief, when we used the term "distributor," we mean to include the importers, the distributors, the contractors, the sellers and anyone else in the distributive chain of the allegedly defective product.

[2] Section 2-621 of the Illinois Code of Civil Procedure is also known as the "seller's exception" or the Illinois Distributor Statute.

submit to Congress an annual report on the national security implications of the bilateral trade and economic relationship between the United States and the People's Republic of China. The Commission was to provide recommendations, where appropriate, to Congress for legislative and administrative action. In March of 2017, the Staff Research Report from the Commission included the following in its Executive Summary:

> Chinese consumer exports to the United States continue to pose a product safety risk. * * * *Due to the effective legal immunity held by some Chinese producers, U.S. importers have a responsibility to be aware of the risks associated with sourcing products in China* ***and to take active steps to ensure the safety of the Chinese products they import into the U.S. market.*** * * * In the absence of vigilant importer monitoring, these faulty [Chinese] products can enter U.S. markets, raising safety risks and leaving U.S. retailers responsible for recall and replacement costs. (Emphasis supplied.)

Snyder, M., and Carfagno, B., "Chinese Product Safety: A Persistent Challenge to U.S. Regulators and Importers," U.S.-Chinese Economic and Security Review Commission Staff Research Report (March 23, 2017), available at https://www.uscc.gov/sites/default/files/Research/Chinese%20Product%20Safety.pdf. See especially, pp. 1, 9 - 19. We discuss the report as well as other commentators in Section IV of this Brief.

In our brief, we submit that the most accurate method of ascertaining and giving effect to the legislature's intent in §2-621 is to adopt a broader rather than a narrower reading of what is meant by "unable to satisfy a judgment as determined by the court."

I. ILLINOIS PUBLIC POLICY HAS CONSISTENTLY FAVORED IMPOSING LIABILITY IN STRICT-TORT CASES ON THE DISTRIBUTOR WHERE, FOR WHATEVER REASON, THE MANUFACTURER COULD NOT BE HELD RESPONSIBLE FOR THE HARM CAUSED BY AN UNREASONABLY DANGEROUS PRODUCT.

It is worthwhile to look at the history of the Distributor's Statute (§2-621 of the Code of Civil Procedure).[3] In 1965, this Court followed the lead of the California Supreme Court, other American courts, and the American Law Institute when it adopted §402A of the Restatement, Second, of Torts in the case of *Suvada v. White Motor Freight Co.* (1965), 32 Ill. 2d 612, 618 - 19, 210 N.E.2d 182. When this Court adopted liability in strict tort in product liability cases, it did so, expressly, based upon the public policy of this state: "[We] recogniz[e] ... *that public policy is the primary factor for imposing strict liability on the seller* and manufacturer of food in favor of the injured consumer ...." (Emphasis supplied.)

The *Suvada* Court pointed to three specific public policies for holding sellers and manufacturers liable in strict tort: "[P]ublic interest in human life and health; the invitations and solicitations to purchase the product; and the justice of imposing the loss on the one creating the risk and reaping the profit ...." (Semi-colons added.) *Id.*

The Court further refined how Illinois public policy favors imposing strict tort liability on distributors, as opposed to the public policy of imposing strict tort liability on manufacturers. Certainly, "a" public policy with distributors is to reduce harm caused by exposure to defective products. However, the Court has been consistent in recognizing

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[3] Our research into the Legislative History of the Distributor's Statute did not show *any* floor debate, etc., which was relevant to the issues in this Brief. Public Act 84-1043. The Act was part of a number of changes to the Code, many of which had nothing to do with product liability.

that with distributors, there are somewhat different albeit related considerations, also based on public policy. The Court fully explained its rationale in *obiter dicta* in the case of *Peterson v. Lou Bachrodt Chevrolet Co.*, 61 Ill.2d 17, 20 - 21, 329 N.E.2d 785, 786 - 87 (Ill. 1975):

> One of the basic grounds supporting the imposition of strict liability upon manufacturers is that losses should be borne by those 'who have created the risk and reaped the profit by placing the product in the stream of commerce.' (32 Ill.2d 612, 619, 210 N.E.2d 182, 186.) **Imposition of liability upon wholesalers and retailers is justified on the ground that their position in the marketing process enables them to exert pressure on the manufacturer to enhance the safety of the product.** (Citing *Dunham v. Vaughan & Bushnell Mfg. Co.* (1969), 42 Ill.2d 339, 344, 247 N.E.2d 401; and Justice Traynor's opinion in *Vandermark v. Ford Motor Co.* (1964), 61 Cal.2d 256, 262 - 263, 37 Cal.Rptr. 896, 391 P.2d 168, 171.) (Emphasis supplied.)

The rationale in ~~by~~ the California Supreme Court's ruling in *Vandermark* was first cited ~~by~~ with approval by this Court in the case of *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339, 247 N.E.2d 401 (Ill. 1969), at 404. See also *Crowe v. Public Building Com.*, 74 Ill. 2d 10 (1978), 13; and *Hammond v. North American Asbestos Corp.*, 97 Ill. 2d 195, at 206, 454 N.E.2d 210, 73 Ill.Dec. 350 (Ill. 1983) ("Imposition of liability upon these parties is justified on the ground that their position in the marketing process enables them to exert pressure on the manufacturer to enhance the safety of the product," citing *Dunham*).

In time, imposing strict-tort liability on product distributors was perceived to be causing a problem with insurance rates. In response, the U.S. Commerce Department developed the Model Uniform Product Liability Act, making it available for voluntary

adoption by the states. 44 Fed. Reg. 212, at 62714 (available online at https://cdn.loc.gov/service/ll/fedreg/fr044/fr044212/fr044212.pdf [October 31, 1979], at 220 - 21). The stated purpose was to curb excessive insurance costs – thought to be 35 cents for every dollar of claims paid – for non-manufacturers in the distributive chain. (*Id.*, and see the discussion below regarding *Kellerman.*)

Of significance in our case, the Model Act also recognized and implemented the existing public policy ~~behind continuing to hold~~ of holding a distributor liable in strict-tort cases under some circumstances. The Model Act in fact provided an out for non-manufacturers / distributors "in a way that does not compromise incentives for loss prevention. It also leaves the claimant with a viable defendant whenever a defective product has caused harm." (*Id.*, at 62726.) The Analysis section of the Act went so far as to include this relevant statement as to the continuation of the public policy in the Act, previously recognized by the judiciary:

> Subsection (C) addresses *the justifiable concern* of Justice Traynor in *Vandermark v. Ford Motor Co.* [citation omitted, but cited with approval in *Dunham,* 247 N.E.2d 401, at 404], that:
>
> > In some cases, the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. **In other cases, the retailer himself may play a substantial part in ensuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end.** (Emphasis supplied.)
>
> A majority of courts have followed the *Vandermark* case and have extended strict liability to retailers. [Citing by name, *inter alia, Housman v. C.A. Dawson & Co.*, 106 Ill.App. 2d 225 (4th Dist. 1969); *Housman,* in turn, cited *Vandermark* as well as *Dunham v. Vaughan & Bushnell Mfg. Co.*, quoted above.]
>
> Section 105 responds to Justice Traynor's concern in cases in which it is

> necessary to do so. * * * [I]f a court determines that it would be highly likely that the claimant would be unable to enforce a judgment against the product manufacturer, the retailer, wholesaler, or distributor has the same strict liability obligations as a manufacturer. (Emphasis supplied.)

Various versions of Section 105 (C) of the Model Act were adopted in Illinois and elsewhere to address the perceived insurance problem. The Act sought to curb some of the suits filed against distributors.

In the case of *Kellerman v. Crowe*, 119 Ill. 2d 111 (1987), the Court explained that at common law, distributors are as liable as manufacturers in strict-tort, product-liability cases. The Distributor Statute modified that, but only to a point. The Court noted that the Distributors Statute provides a means by which certain defendants may avoid the costs of defending a product liability action once the viable manufacturer has been made a party. The distributor in the case argued that a dismissal of a distributor could be final. However, the Court rejected that argument, noting that a distributor may later be reinstated. The Court stated: "[T]o adopt the defendants' reading of the statute would enlarge considerably *the limited benefit it was meant to provide to nonmanufacturers*." *Supra*, at 116. (Emphasis supplied.)

II. AN ANALYSIS OF THE "PLAIN AND ORDINARY MEANING" OF §2-621 DEMONSTRATES THAT THE DEFENDANT CHINESE CORPORATION WAS A PARTY "UNABLE TO SATISFY A JUDGMENT AS DETERMINED BY THE COURT."

This Court has held consistently that "[O]ur primary objective in interpreting a statute is to ascertain and give effect to the intent of the legislature." *Solon v. Midwest Med. Records Ass'n, Inc.*; 236 Ill.2d 433, 925 N.E.2d 1113, at 1117, (Ill., 2010), (citing *Landis v. Marc Realty, L.L.C.*, 235 Ill.2d 1, 11, 919 N.E.2d 300 (2009) (discussed

below).) If a statute is not found to be ambiguous, a Court will look to the plain and ordinary meaning of a statute in order to determine the legislature's intent (with a single exception, which we discuss below in Subpart B of this this section). If the Court finds an ambiguity, a different set of considerations apply. (We discuss the different set of considerations in Part III of our brief, which analyzes how the Act should be constructed it is found to be ambiguous.)

Counsel for Plaintiff argues in its Brief that a "plain language" analysis of the Distributor's Statute should result in a broader rather than a narrower construction of "unable to satisfy any judgment as determined by the court." We agree with those arguments, but we will not repeat those as they were submitted.

A. Legislative Intent Looking Only at the Text of the Statute.

The Legislature's intent in passing the Distributor Statute can be discerned, in part, from a careful look at the built-in exceptions to the rule that exempts distributors from liability in strict tort product liability cases. Those exceptions are as follows. A trial court is not to dismiss a distributor if: 1) the distributor exercised some significant control over the design of the product; 2) the distributor exercised some significant control over the manufacture of the product; 3) the distributor provided instructions to the manufacturer regarding the alleged defect; 4) the distributor provided warnings to the manufacturer regarding the alleged defect; 5) the distributor had actual knowledge of the alleged defect in the product; or 6) the distributor created the alleged defect in the product. Each of these exceptions has in common the fact that the distributor had some role to play in the defect, however limited, which contributed to make the product unreasonably dangerous. Thus, clearly the Legislature intended to continue to include

distributors in strict-tort cases where the distributors had *any* sort of involvement in the design or manufacture of the product.

Even assuming that the distributor was otherwise blameless and was properly dismissed from the case, though, the distributor could still be brought back in: 1) where the statute of limitations barred recovery from the manufacturer; 2) where the statute of repose barred a case against the manufacturer; 3) where the distributor misidentified the manufacturer; 4) where the manufacturer no longer existed; 5) where the manufacturer was not be subject to the jurisdiction of Illinois; 6) where the manufacturer was not amenable to service of process, despite due diligence; 7) where the manufacturer was unable to satisfy any judgment, as determined by the court; 8) where the court determined that the manufacturer would be unable to satisfy a reasonable settlement; or 9) where the court determined that the manufacturer would be unable to satisfy another agreement with the settlement. These nine additional exceptions focus on the liability of an otherwise-blameless distributor in situations where a plaintiff harmed by an unreasonably dangerous product is unable to make a complete recovery from the manufacturer – one of the three aspects of public policy mentioned by Justice Traynor in the *Vandermark* case (*supra*, at 5).

The intent of the verbiage of the legislation is readily discerned. With a total of fifteen stated exceptions to the rule, nine of which are related to an otherwise blameless distributor, it is clear that the legislature had absolutely no intention of defeating the public policy of the state to provide compensation to consumers who were hurt by unreasonably dangerous products under any circumstances. There certainly was nothing *remotely* close to the interpretation urged by the defendant here, *i.e.*, that the Legislature

had somehow developed an interest in protecting manufacturers who were based in a country which ignored the rule of law followed in the U.S., Canada, England, Germany, Japan and elsewhere.

B. Absurd Construction.

We discuss the sub-issue of how an "absurd construction" should be treated in Section III of our Brief, below (clarifying why the Defendant's view of the subject verbiage should be construed as "absurd"). However, we here make the point that even if a court finds no ambiguity in a statute and looks only at its "plain language," the Court is not bound by the literal language of that statute, if doing so would produce a result inconsistent with clearly expressed legislative intent or one that would yield absurd or unjust consequences not contemplated by the legislature. That principle was set forth in the case of *In re D.F.*, 208, Ill. 2d 223, 802 N.E. 2d 800, 805 (2003):

> A plain language or literal reading of [the subject law] ... supports respondent's position .... *A court, however, is not bound by the literal language of a statute* that produces a result inconsistent with clearly expressed legislative intent, or *that yields absurd or unjust consequences* not contemplated by the legislature. [Citations omitted.] A literal reading of [the subject law] ... yields a result inconsistent with the legislature's statements of public policy and purpose .... (Emphasis supplied.)

See also *People v. Hanna,* 207 Ill. 2d 486, 497-99, 800 N.E.2d 1201 (2003): " `[I]f the clear language [of a statute], **when read in the context of the statute as a whole or** of the commercial or **other real-world * * * activity that the statute is regulating,** points to an unreasonable result, courts do not consider themselves bound by "plain meaning," but have recourse to other interpretive tools in an effort to make sense of the statute.' "

Hanna, 207 Ill.2d 486, 497-99, 800 N.E.2d 1201 (emphasis supplied), quoting Judge Richard Posner from *Krzalic v. Republic Title*, 314 F.3d 875, 879-80 (7th Cir. 2002).

III. THE DEFENDANT CHINESE CORPORATION WAS "UNABLE TO SATISFY A JUDGMENT AS DETERMINED BY THE COURT," EVEN IF THIS COURT CONSTRUES THE LAW TO BE AMBIGUOUS.

As we noted above, different rules of statutory construction can apply if a statute is found to be ambiguous. When is a statute considered to be ambiguous? "A statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more different ways." *Krohe v. City of Bloomington*, 204 Ill.2d 392, 395-96, 273 Ill.Dec. 779, 789 N.E.2d 1211 (2003), cited in the *Landis* case, discussed in detail below.

In our case, two appellate courts came up with different answers regarding the meaning of "unable to satisfy a judgment as determined by the court." In the Appellate Court proceedings in our case, different justices, both using dictionaries, came up with differing interpretations regarding the verbiage in question. See ¶¶25 - 26; cf. ¶¶49 - 50, Does that make the law "ambiguous"?

This Court's decision in the case of *Landis v. Marc Realty, L.L.C.*, 235 Ill. 2d 1, 919 N.E.2d 300, 335 Ill.Dec. 581 (Ill. 2009) is instructive. Suit in *Landis* was filed after more than two years after an alleged ordinance violation. In the case, the question was whether the penalty imposed for the *ordinance* violation involving a security deposit was a "*statutory* penalty" as that term is used in the statute of limitations. A lawsuit involving a "statutory penalty" must be filed within two years. However, a lawsuit filed under the statute of limitations catch-all provision or pursuant to the breach of a contract have different and longer time limits. The question in *Landis,* therefore, was whether the

"statutory penalty" statute of limitations barred the lawsuit in question or whether one of the two longer statutes of limitation should apply instead.

The *Landis* Court noted that different courts, using dictionaries and other resources, had come up with different answers as to whether an ordinary violation involved a "statutory penalty." The questions: Is an "ordinance" a "statute"? Is "remedial relief" a "penalty"? The plaintiff argued that if the legislature, in enacting the statute of limitations, had intended for ordinance to be covered by the term "statutory penalty," it would either have included the term "ordinance," specifically, or it would have used a more comprehensive term, like "enactment." *Landis*, at 304 - 05. The plaintiff argued that the two-year "statutory penalty" statute of limitations should not bar the case. In the absence of either specifically including the term or using a broader term which included "ordinance," Plaintiff argued, the Court could not assume that the legislature intended the term "statutory penalty" to include "ordinance" violations.

In resolving the issue, the *Landis* Court first concluded that there was more than one way to interpret "statute":

> [I]t is clear that the dictionary definitions do not definitively resolve the question as to which meaning the legislature intended. 'The existence of alternative dictionary definitions of [a word], each making some sense under the statute, itself indicates that the statute is open to interpretation.' (Citation omitted.) The alternative definitions, together with the split in our appellate court, lead to the conclusion that the term 'statutory' does not have a single plain meaning but is ambiguous. * * * The statute at issue can reasonably be understood in two ways.

Landis v. Marc Realty, L.L.C., 235 Ill. 2d 1, 919 N.E.2d 300, 306 (Ill. 2009).

A. Principle 1: If a Statute Is Ambiguous, a Court Should Adopt the Broader

Interpretation. Here, the Broader Interpretation of "Unable to Satisfy a Judgment as Determined by the Court" Should Be Applied.

After finding an ambiguity, the *Landis* Court applied two principles of statutory construction.

> [First, i]t is a general principle of statutory interpretation that we give statutes the fullest, rather than the narrowest, possible meaning to which they are susceptible. *Collins v. Board of Trustees of Firemen's Annuity & Benefit Fund,* 155 Ill.2d 103, 111, 183 Ill.Dec. 6, 610 N.E.2d 1250 (1993); *Lake County Board of Review v. Property Tax Appeal Board,* 119 Ill.2d 419, 423, 116 Ill.Dec. 567, 519 N.E.2d 459 (1988). In the absence of any indication that the legislature intended the term 'statutory' to have a narrower meaning, we conclude that the legislature intended the broader meaning – that 'statutory' encompasses municipal ordinances as well as state statutes.

Landis, 919 N.E.2d 300, at 306.

As noted in *Landis* and elsewhere, when a statute is considered ambiguous, this Court should apply the fullest rather than the narrowest interpretation. Here, the broader interpretation would be to include those circumstances where a manufacturer has been found "unable to satisfy a judgment as determined by the court," including those circumstances where a court determines that a plaintiff has expended sufficient effort to show that a manufacturer is judgment-proof. (See the Appellate Court opinion, at ¶38.)

B. Principle 2: If a Statute is Ambiguous, the Court Should Not Apply a Definition Which Would Result in Absurd or Unjust Consequences; Adoption of the Defendant's Proposed Definition Here Would Cause an Absurd Result.

After discussing the narrow vs. broader interpretation, the *Landis'* Court's analysis continued:

> [Second] ... it is appropriate to consider the consequences that would result from construing a statute one way or the other. [Citation omitted.] In doing so, we presume that the legislature did not intend absurd, inconvenient, or unjust results. [Citation omitted.] Under the plaintiffs' proposed reading of the statute, an action for a penalty in a state statute would be subject to a two-year limitations period, while an action for a penalty in a municipal ordinance would be subject to a five-year limitations period. * * * **There is no evidence that the legislature intended to differentiate between these two types of claims, or between two groups of plaintiffs.** To allow a plaintiff an additional three years to file a claim based on a municipal ordinance would, in the words of the defendants, 'elevate municipal law over State law.'

Landis, 919 N.E.2d 300, at 306. (Emphasis supplied.)

The appellate court dissent in our case stated, at ¶50, that a narrow interpretation of the subject verbiage should have been employed. The reason? "[T]here is nothing in the plain language of the statute to support the contention that plaintiff's difficulties in enforcing the default judgment in China[4] or elsewhere rendered Taihua Group unable to satisfy that judgment."

We ask the Court here to consider the business of collecting on a judgment. A judgment is rendered. The defendant does not pay, despite diligent efforts to collect. Then an action to collect is filed. But in China and some other countries, filing such actions is a fool's mission. (See Section IV, *infra.*) So: The dissent is premising its opinion on the notion that the statute should not apply, *just because the plaintiff will*

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[4] "China" as we use that term means the Peoples Republic of China.

never be able to satisfy the judgment in China, even though the Taihua group had the moneys to pay the judgment? Put another way: Is this to say that the statute does not apply just as long as the defendant is in a country where playing "legal keep-away" is considered a perfectly acceptable practice?

To suggest that the legislature was comfortable in barring cases against Illinois sellers and distributors in certain product liability cases – cases where the manufacturers were from China and similar countries, countries where judgments simply cannot be collected – is with due respect – "absurd." To quote the *Landis* court (preceding page), "There is no evidence that the legislature intended to differentiate between these two types of claims, or between two groups of plaintiffs."

Why would the legislature do so? What rational basis would there be for protecting distributors of goods manufactured in China and similar countries, as opposed to distributors of goods which are manufactured in the U.S., many countries in Europe, Japan, or Canada? The only difference is that the North American and most European and Asian countries respect the fact that their manufacturers are subject to the liability laws of the State of Illinois. That fact, *i.e.*, that a country is fairly notorious for disregarding the collection laws of the U.S. and Illinois, takes the reasoning from *Landis* one step further. In *Landis,* the Court saw no reason and therefore refused to differentiate between people violating municipal ordinances and people violating State of Illinois statutes. In our case, if the Court *were* to differentiate and make the cost of doing business cheaper for one of two groups, would it not make more sense to reward the group of manufacturers from the U.S.A., Germany, England, Canda, Japan, *et al.*, who choose to follow Illinois law related to collections? As opposed to a country which

chooses to disregard that body of law? (Again, see the discussion below, in Argument IV for specifics.)

If this Court were to adopt a narrow definition of the subject verbiage, it:

1. Would shift the cost of defective products to a number of Illinois consumers who were harmed by unreasonably dangerous and defective products;
2. Would also shift an additional burden to taxpayers from Illinois, who would now be paying the medical bills for a number of uninsured or underinsured Illinois consumers who were harmed by unreasonably dangerous and defective products;
3. Would shift the "misery costs" (pain, suffering, loss of a normal life) of defective products which harmed Illinoisans to a number of the harmed individuals, their families and their communities; *but*
4. Would provide a break for some foreign / non-USA manufacturers – i.e., a break to some manufacturers who employed not a single USA citizen – by allowing them to forego the costs of making products which are reasonably safe;
5. Would not provide that break to *all* foreign manufacturers, only to those from countries which allow their native manufacturers to avoid responsibility by promoting a form of "legal keepaway" from suits filed by Illinois consumers harmed by the native manufacturers' products; and
6. Would provide the financial benefit not just to smaller, commercially insignificant countries. The financial "leg-up" provided to those non-USA manufacturers would apply primarily for the benefit of manufacturers in a country which does more than $500 *billion* per year in trade with the USA and which is the USA's Number 1 trade partner.

Not to be forgotten in the analysis are Illinois manufacturers and the people employed by them. Imagine that this Court adopted the narrower version of the Distributor Statute (bankrupt or out-of-business, only). As we discuss below (Section IV of our Brief), it is very well-known that there is *no* way to hold a corporation from China accountable in a strict-tort product liability case. Chinese corporations do not go bankrupt, but they frequently do contest jurisdiction, they do evade service and they do, in some other manner, ignore attempts to collect debts generated in U.S. court proceedings. If the Defendant's version of §2-621 were to apply, when the harmed consumer could not force the Chinese manufacturer into bankruptcy, a harmed consumer would never be able to hold the distributor accountable.

So, what is the take-away for a local product *distributor* if this Court adopts a narrow construction of the Act? If the local distributor works with a U.S. manufacturer and sells products made here by U.S. citizens, the distributor faces the risk of being held responsible for unreasonably dangerous products. How? If the U.S. manufacturer were to go broke after a sale was made, then the broker could be held accountable for the unreasonably dangerous product. So: Would it not make far more sense for that broker to become a conduit for the cheaper, Chinese products, even if they were more dangerous than the U.S.-made products? How would that work? If the narrower definition applies, the distributor would never have to be held accountable in a strict-tort product liability case. The reason? A plaintiff would first have to go through a legal process in China, and as we describe in Section IV, the Chinese government will not let that happen. (If that changes in the future, the Court would be more likely to conclude that the Chinese manufacturer was able to satisfy a judgment.)

Accordingly, a distributor – even one who knows that goods made in China are inferior to those made in the US and elsewhere – would also know that those goods will sell more readily because they are cheaper. At the same time, the local distributor could rest assured that there would never be adverse consequences of selling those cheaper, more dangerous products – at least not in Illinois. The Distributor Act and existing Chinese policy would serve to wall off any possible legal blowback to the distributor for its sale of defective and unreasonably dangerous products – as long as the manufacturers were from China.

The point we seek to make here is obvious: For any number of reasons, there is no way – simply no conceivable way – that any legislator, let alone majorities in both the House and the Senate, would seek to enact legislation favoring foreign manufacturers who flout Illinois laws related to judgment enforcement over manufacturers from Illinois and the rest of the U.S. – and *their* employees – who follow those same laws. It would be absurd, if not incomprehensible, to think that the Illinois legislature was in some way motivated to protect manufacturers from China and other countries over the interests of Illinois consumers, Illinois manufacturers and the employees of Illinois manufacturers.

IV. THE PUBLIC POLICY OF THIS STATE AS TO THE LIABILITY OF DISTRIBUTORS IN STRICT TORT CASES HAS NOT CHANGED SINCE THE ENACTMENT OF THE DISTRIBUTOR STATUTE.

In this section, we seek to clarify that the public policy of this state has not changed since passage of the Distributors Act. Far from it. If anything, there are even more compelling reasons for continuing to recognize that there are situations where distributors should be held liable for harm caused by unreasonably dangerous products.

Those reasons include the same policies – set forth by this Court in the *Dunham, Peterson, Crowe*, and *Hammond* cases, and by Justice Traynor in the *Vandermark* case – which include, broadly speaking, situations where the manufacturer cannot be held liable for an injury for whatever reason; or where the distributor has a role, however slight, in creating the danger in the product. The reasons for this policy? As Justice Traynor mentioned: 1) In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff; 2) In other cases the retailer himself may play a substantial part in ensuring that the product is safe; or 3) In other cases the retailer himself may may be in a position to exert pressure on the manufacturer to ensure that the produce is safe.

China. Much of what we submit in this section is intended to make clear that the public policy behind adoption of liability in strict tort as well as the Distributor Statute is even more compelling when we look at the U.S.'s Number 1 trading partner: China. We focus on China because of the magnitude of trade involving China, but also because of the utter disparity between the way business is conducted in the U.S., the rest of North America, Japan, and many countries in Europe, and the way business is conducted in China.

The issues of the lack of product safety in China and the Chinese reaction to that lack of product safety, in the context of product liability cases, jurisdiction, judgment enforcement and other procedural issues addressed in this brief, were very carefully documented in Glynn, S., "Toxic Toys and Dangerous Drywall: Holding Foreign Manufacturers Liable for Defective Products—The Fund Concept," 26 *Emory Int'l L. Rev.* 317, 317 - 53 (2012), hereafter "Glynn" (available online at http://law.emory.edu/ eilr/_documents/volumes/ 26/1/comments/glynn.pdf). See also Hunt, E.A., "Made in China: Who Bears the Loss and Why?", 27 *Penn State Int'l L. Rev.* 915, 915 - 27, 933 - 35 (2009), hereafter "Hunt" (available online at https://elibrary.law.psu.edu/cgi/ viewcontent.cgi?article =1276&context=psilr ; and Snyder, M., and Carfagno, B., "Chinese Product Safety: A Persistent Challenge to U.S. Regulators and Importers," U.S.-Chinese Economic and Security Review Commission Staff Research Report (March 23, 2017), available at https://www.uscc.gov/sites/default/files/Research/ Chinese%20Product%20Safety.pdf, hereafter "Staff Report" (quoted in the introduction).

How Big a Trade Partner? In 2008, China exported $338 billion of goods to the U.S. That number climbed steadily. In 2017, the number was $506 billion. (U.S. Census Bureau, https://www.census.gov/foreign-trade/balance/c5700.html.) In 2015, fully 35% of U.S. imports were from China. ~~Snyder, M., and Carfagno, B., "Chinese Product Safety: A Persistent Challenge to U.S. Regulators and Importers," U.S.-Chinese Economic and Security Review Commission Staff Research Report (March 23, 2017), available at https://www.uscc.gov/sites/default/files/Research/ Chinese%20Product%20Safety.pdf (hereafter Staff Report), at 2. (We quoted from the Staff Research Report in our Introduction.)~~

How Big a Safety Problem? In 2013, imported goods from whatever country accounted for more than 80% of all Consumer Product Safety Commission (CPSC) recalls. Staff Report, at 2. But among imported goods, "China goods represent a disproportionate share of product recalls in the U.S. and import refusals for safety reasons." Id. An example: in 2014, China accounted for 23 % of all goods – foreign and domestic – under the CPSC's jurisdiction, but Chinese goods accounted for 51% of all recalls of foreign and domestic products. By comparison, Mexico's numbers were 5% total / 4% total recalls. On a dollar-for-dollar basis, Chinese goods produced three times as many recalls as Mexican consumer imports. *Id.*

Existing federal agency resources are insufficient to stop the influx of defective Chinese products. "The CPSC currently [2017] lacks sufficient staff to inspect imported products at all U.S. ports. * * * [T]he [CPSC] agency has been unable to inspect every shipment identified by its methodology as 'high risk,' enabling some to enter the U.S. uninspected." (*Id.*, at 2 - 3.) There is a long list of Chinese products which have caused harm through the years, including (but certainly not limited to): hoverboards (Staff Report, at 3); honey (id., at 4); drywall (Glynn, 317 - 18); toys (Hunt, at 916); and tires (*id.*). We discuss three of those products here.

Getting around U.S. Regulations: Honey. The Chinese were known to be "dumping" honey into the U.S. In 2001, the U.S. began applying antidumping duties on the import of Chinese honeys. The Research Staff, quoting Food Safety News, suggested that one-third of all honey consumed in the U.S. was smuggled from China through another country. (At 10.) Making the case: Malaysia, a country whose capacity to produce honey is about 45,000 pounds of honey per year, has exported up to 37 *million*

pounds of honey to the U.S. annually, according to the American Honey Producers Association. *Id.* And in 2016, the U.S. seized 60 tons of Chinese honey that were transshipped through Vietnam. Research Staff, at 11.

Walking Away from Specs: Tires. In addition to "dumping" honey, directly or through other countries, some manufacturers from China simply change manufacturing designs in order to increase profitability. Hunt, at 922, points out that a common practice in China is that a manufacturer will win a contract, will follow the guidelines set forth, but will then, for cost reasons, no longer do so. What then? Cheaper ingredients are used, chemical formulations are altered, or sanitary standards are curtailed. See also Glynn, at 330. Glynn refers to the process in China of switching ingredients or processes after securing a contract to produce goods as "quality fade." At 331.

Another specific example involved automobile tires. The Chinese manufacturer allegedly "deliberately and secretly" omitted gum strips from automobile tires. The strips are a safety feature. The strips were omitted in order to cut costs. Doing so also created a situation where the a tread could suddenly become wrapped around an axle. The defect resulted in one accident on the Pennsylvania turnpike that killed two men and left another with brain damage. The crash was followed by an ambulance rollover in New Mexico. NHTSA ordered the local distributor to recall 450,000 tires.

Omitting the gum strips resulted in a savings of less than a dollar per tire. Thus, the tremendous loss resulting from this deliberately-omitted safety step could have been avoided for about $450,000.00. A recall of the tires cost between $50,000,000 and $80,000,000. That number includes absolutely no factoring the damages for the wrongful death and personal injury cases. Hunt, at 920 - 23.

Barriers to Service of Process: Drywall. Many of our members are familiar with the difficulty in suing a Japanese corporation, *e.g.*, the auto manufacturer, Nissan Jidosha, Kabushiki-Gaisha, and in then effecting service under the Hague Convention. However, if the case warrants it, there are existing services that can get the job done – for a price. See, *e.g.*, ABClegal.com. The same cannot be said for service on Chinese corporations.

Frederick Langer described the nightmare of attempting to effect service on Chinese corporations related to the drywall litigation. Langer, F.S., "Service of Process in China," ABA Section of Litigation, 2012 Annual Conference, available at https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/19-1_service_of_process_in_china.authcheckdam.pdf. His efforts were summarized by the Research Staff:

> [Service on Chinese firms via the Hague Service Convention] is lengthy, burdensome and reliant on the cooperation of Chinese government officials for success. * * * [T]he Chinese government has been known to reject applications for alleged inaccuracies, or reject papers directed to firms tied to the Chinese government. The ABA has called the process unduly time consuming and notes that cooperation from Chinese officials cannot always be expected. Research Staff, at 13 - 14.

The ABA paper, cited above, further explains just how difficult, time-consuming, aggravating, and frequently futile the business of obtaining service on a Chinese company process can be. Glynn noted that due to complex supply chains and collusion between government and factory owners, Chinese authorities often fail to serve process or cannot locate the accused company because the company has dissolved or changed ownership. At 343.

Barriers to Collection in China.[5] Our case involves collection efforts in China that did not result in a bankruptcy. Regarding enforcement: "Enforcement of a U.S. judgment in China is the most formidable obstacle an injured U.S. consumer faces." Even assuming jurisdiction, "the judgment is meaningless until the injured consumer receives financial compensation." Glynn, at 344. Article 267 of the Chinese Civil Procedure Law mandates either the existence of a treaty or *de facto* reciprocity to enforce a foreign judgment in China. Neither of those exist. Glynn, at 344.

Here is what The Research Staff of the U.S.-China Economic and Security Review Commission said about the difficulty of collecting on a judgment in China:

> Seeking redress from Chinese companies that ship unsafe products into the U.S. can be extremely difficult. Chinese firms often claim that they are not subject to U.S jurisdiction, and basic procedures – such as serving Chinese defendants and obtaining discovery – are subject to time-consuming and often unreliable international procedures that require cooperation from the Chinese central government. These barriers protect offending Chinese firms from the consequences of their actions and place the responsibility for compensating U.S. consumers on U.S. importers and retailers who are easier to bring to court. *They also dull incentives for Chinese firms to ship safe products by lightening their legal responsibility.* Additionally, Chinese state-owned enterprises (SOEs) have recently begun using the U.S. Foreign Sovereign Immunity Immunity Act (FSIA) to claim they are immune to civil prosecution under U.S. law. *Id.*, at 12 -13. (Emphasis supplied.)

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[5] Although we confine our specific comments on the commercial practices of China, there are other countries, including Norway, Austria, and the Netherlands, among others, which "are severe trouble spots for U.S. litigants seeking to enforce their money judgments." See Zeynalova, Y., "The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?" 31 *Berkeley J. Intl. Law* 150 (2013), at 173, and n. 143. We focus on China by name because the vast majority of problems our membership has with foreign manufacturers arise as a result of unreasonably dangerous products made in China.

The Research Staff as well as Glynn cited our previous example of defective drywall sold by Chinese. Between 2004 and 2007, an estimated 100,000 homes were built using tainted drywall from China. The drywall released hydrogen sulfide gas, which produces a rotten-egg odor, corrodes metal, and destroys electronic equipment. Adverse health effects included asthma attacks, difficulty in breathing, nosebleeds, and persistent headaches. Approximately 5,600 homeowners have filed suit. Property casualty consultants estimate that the losses might be as high as $25 billion.

Lawsuits seeking $2 billion have been filed. A Chinese affiliate of a German company agreed to pay $800 million. "Extraordinary measures" were required to even force the other firm, Taishan, to participate in court proceedings. Taishan first claimed it was immune from U.S court proceedings. In 2012, a judge ruled otherwise. Taishan's solution? It stopped appearing in court; it ignored court-related correspondence. It lost a $2.7 million case in Virginia to seven Virginia families, but the judgment could not be collected. In 2014, a U.S. judge took the exceptional step of preventing Taishan or any of its affiliates from doing business in the U.S. and issued a penalty, based upon Taishan's contempt of court. Taishan then began cooperating in that one case, but still has not agreed to make payments to thousands of other affected U.S. homeowners. Staff Research, at 13. See also Glynn at 317 - 18; and 344 - 46.

Recently, there was a single exception to the [absence of] reciprocity rule. That took place in a case where a plaintiff who was a Chinese citizen sued two Chinese citizen defendants. The case involved a United States sale of stock. In 2016, for the first time, a Chinese court enforced a default judgment. This case is described in detail in Harris, D., "China Enforces United States Judgment: This Changes Pretty Much Nothing," China

Law for Business (Sept. 5, 2017), available at https://www.chinalawblog.com/2017/09/china-enforces-united-states-judgment-this-changes-pretty-much-nothing.html. The author is a lawyer who writes a blog regarding China and the law. His conclusion after the first exception was that even with the single enforcement, his advice had not changed from the advice he gave in 2016. Harris quoted from the earlier article, where he stated:

> At least once a month, one of my firm's China lawyers will get a call or an email from a U.S. lawyer seeking our help in taking a U.S. judgment (usually a default judgment) to China to enforce. The thinking of the U.S. lawyer is that all we need do is go to a China court and ask it to convert the U.S. judgment into a Chinese judgment and then send out the Chinese equivalent of a sheriff to the Chinese company and start seizing its assets until it pays.
>
> As we have consistently written, nope, nope, nope.

Harris, D., *supra,* at 2.

Impact on the Tort System When a Judgment Cannot Be Collected. Judge Richard Posner expressed a theory that economic actors will forego preventative measures when the cost of accidents, and therefore the cost of liability, is less than the cost of prevention. Hunt, at 919, citing Posner, R., "A Theory of Negligence," 1 *J. Legal. Stud.* 29, 33 (1972). This theory makes sense: If there is no penalty for ignoring safety considerations, why should a manufacturer bother making a product which is reasonably safe?

Judge Posner's theory dovetails well with the quoted public policy from *Vandermark* and *Dunham*, above, at page 4: "Imposition of liability upon wholesalers and retailers is justified on the ground that their position in the marketing process enables them to exert pressure on the manufacturer to enhance the safety of the product."

Chinese manufacturers have created a quality problem and asked U.S. importers, distributors and retailers to assume all the associated legal and economic risks. Glynn, at 327. Put another way, if consumers, the existing U.S. governmental agencies, and the courts are unable to directly influence Chinese manufacturers to make products which are reasonably safe, who else is available to bring the message of safety home to those manufacturers, *other* than the distributors? We would ask the Court to compare this quote, from *The Economist*, to the quote in *Vandermark*: "No doubt, many importers will examine their supply chains more carefully, if only for fear that they will be sued by customers who have bought poisonous furniture or explosive mobile telephones, and shunned by others who hear about such fiascos." "China's Toxic Toymaker," *Economist*, August 18 - 24, 2007, at 58 (cited by Glynn, at 327).

The Research Staff also reviewed various recalls and scandals and came up with an appropriate conclusion: "Given the product safety risks associated with some Chinese imports and the effective legal protections enjoyed by Chinese producers, U.S. importers have an important role to play in confirming the safety of their imports, as they will likely bear responsibility for recalling products and compensating consumers." At 14.

CONCLUSION

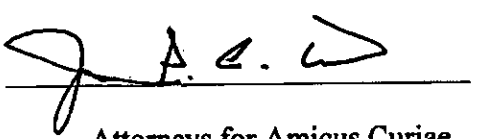
With the foregoing in mind, we submit that it is inconceivable that the Illinois legislature intended, by the adoption of the Distributor Statute, to allow Chinese manufacturers a competitive edge over manufacturers from both our state, from other states, and from other countries which recognize the liability laws and collection laws which apply in Illinois. If anything, the insurance costs for brokers doing business only with U.S. manufacturers – the initial reason for adopting the Distributor Statute – would

now be greater than those of brokers doing business only with judgment-proof Chinese manufacturers.

For the last 53 years, our courts and our legislature has worked to ensure that products used and sold in this state are reasonably safe. The subject of this appeal, the Distributor Act, was never intended to apply only to domestic, Canadian, Japanese, German, English, and manufacturers from similar countries, but not to apply to countries like China, where the goverment refuses to recognize, let alone enforce, judgments rendered by Illinois courts. It is inconceivable that the Illinois legislature would have made that the law, regardless of whether the Court looks at the public policy of our state in 1965, at the public policy of our state in the early 1980's, or at the public policy in effect in the 2010's. We respectfully submit that it would be absurd to hold otherwise.

Accordingly, we would ask this Court to affirm the judgment of the Appellate Court, below.

Respectfully submitted,



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Docket No. 122873

IN THE ILLINOIS SUPREME COURT

MARTIN CASSIDY,

Plaintiff-Appellee,

v.

CHINA VITAMINS, LLC,

Defendant-Appellant,

and

TAIHUA GROUP SHANGHI TAIWEI TRADING COMPANY LIMITED and ZHEJIANG NHU COMPANY, LTD., Defendants.

On Appeal from the Illinois Appellate Court, First Judicial District, Docket No. 1-16-0933, there heard on appeal from the Circuit Court of Cook County, Law Division Court No. 07 L 13276, the Honorable Kathy M. Flanagan, Judge Presiding

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service and those matters to be appended to the brief under Rule 342(a), is 27 pages

Illinois Trial Lawyers Association

Signed and sworn to before me on the 27 day of March, 2018.

Notary Public

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